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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554
Federal Communications Commission
Office of Secretary

In the Matter of)
)
AMERICAN COMMUNICATIONS SERVICES, INC.) CC Docket No. 97-100
)
Petition for Declaratory Ruling)
Preempting Arkansas Public Service)
Commission Pursuant to Section 252(e)(5))
of the Communications Act, as amended)

TO: The Commission

REPLY COMMENTS OF
NORTHERN ARKANSAS TELEPHONE COMPANY

Northern Arkansas Telephone Company (NATCO), by its attorneys, submits its reply comments regarding American Communications Services, Inc.'s (ACSI's) petition for preemption of the Arkansas Public Service Commission (Arkansas PSC): (a) from arbitrating and approving interconnection agreements; and (b) from denying requests by competitive local exchange carriers (CLECs) to receive universal service support.

Background

As detailed in NATCO's initial comments, ACSI has not shown any of the requisite **conflict** between the Arkansas Telecommunications Regulatory Reform Act of 1997 (Arkansas Act) and the Telecommunications Act of 1996 (1996 Act). Rather, ACSI seeks an extraordinary broad and precipitous preemption of both a state statute and a state commission under the spurious "theory" that the Commission should supplant the Arkansas PSC in order to impose requirements upon Arkansas carriers "above and beyond" those mandated by the 1996 Act and the Commission's implementing rules.

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Among other defects, ACSI's "theory" is contrary: (a) to controlling judicial precedent regarding federal preemption of state law (e.g. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-69 (1986)); (b) to the basic federal-state regulatory system established by Section 2(b) of the Communications Act and reiterated in the 1996 Act; and (c) to the state sovereignty rights protected by the Tenth Amendment to the United States Constitution. Moreover, the preemption requested by ACSI is futile, for the Commission (whether acting on its own or standing in the place of the Arkansas PSC) cannot impose requirements "over and above" those set forth in the 1996 Act and its own rules. See U.S. v. Nixon, 418 U.S. 683, 695-96 (1974); Service v. Dulles, 354 U.S. 363, 388 (1957) (an agency is bound by its own rules, and may depart from them only by amending them).

**The Rural Provisions Of The Arkansas Act
Do Not Conflict With The 1996 Act**

The comments of the Association for Local Telecommunications Services (ALTS) request that the scope of preemption be expanded to encompass the rural provisions of the Arkansas Act (ALTS Comments, pp. 4-6, 8-9). ALTS claims: (a) that Sections 10(b) and (c) of the Arkansas Act conflict with the 1996 Act's rural exemption from incumbent carrier interconnection obligations [Section 251(f)(1)]; and (b) that Section 5(d) of the Arkansas Act conflicts with the 1996 Act's "eligible telecommunications carrier (ETC)" provision regarding universal service support in rural telephone company service areas [Section 214(e)(2)]. These claims are both unsubstantiated and incorrect.

Rural Interconnection. Section 251(f)(1)(B) expressly gives states the right "to conduct an inquiry for the purpose of determining whether to terminate the [Section 251(f)(1) rural] exemption" and the right to "terminate the exemption" where they find that termination "is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [regarding universal service]."

In paragraph 1253 of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report And Order, CC Docket No. 96-98 (1996) ("Local Competition Order"), the Commission held that determinations whether a telephone company is entitled to an exemption [or to a suspension or modification under Section 251(f)(2)] "generally should be left to state commissions." It proceeded to state its "interpretations" of certain aspects of Section 251(f) because "it appears that many parties welcome some guidance from the Commission." Id. at para. 1254. These limited Commission "interpretations" included a rule defining the "not unduly economically burdensome" standard [Rule 51.405(c), which is currently subject to the Eighth Circuit appeal]. However, the Commission declined "to adopt national rules or guidelines regarding other aspects of section 251(f)," including the "consistent with section 254" standard. Id. at para. 1263.

Sections 10(b) and (c) of the Arkansas Act constitute a wholly consistent and appropriate exercise of the State's jurisdiction over termination of Section 251(f)(1) exemptions, and related inquiry proceedings. The Arkansas Legislature did not address the

"not unduly economically burdensome" standard for which the Commission had adopted a rule, but rather dealt only with the "consistent with section 254" standard on which the Commission had remained silent.

Section 10(b)(3) of the Arkansas Act clarified that the term "consistent with section 254" means "consistent with the protection of universal service and the public interest, convenience and necessity." Section 10(c) then listed the findings which the Arkansas PSC must make under this standard before terminating an exemption. These findings relate directly to the preservation of quality telecommunications services at just, reasonable and affordable rates in rural Arkansas. They constitute a reasonable and consistent exercise of the Arkansas Legislature's and Arkansas PSC's responsibilities to preserve and advance universal service in conjunction with the particular local economic conditions prevailing in the State.

Universal Service Eligibility. Section 214(e)(2) expressly assigns to state commissions the task of designating the ETCs eligible to receive federal universal service support. It states that "the State commission **may**, in the case of an area served by a rural telephone company, and **shall**, in the case of all other areas, designate more than one common carrier as an [ETC] for a service area designated by the State commission [emphasis added]."

At paragraph 135 of Federal-State Joint Board on Universal Service, Report And Order, CC Docket No. 96-45 (1996), the Commission recognized the discretion given to the states to

designate only one ETC in each rural telephone company service area. It held that "the discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one eligible carrier in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional eligible carrier is in the public interest." Id.

Section 5(d) of the Arkansas Act is wholly consistent with the discretion afforded to states to designate only one ETC in rural telephone company service areas. It states that "[f]or the entire area served by a rural telephone company, . . . there shall be only one [ETC] which shall be the incumbent local exchange carrier that is a rural telephone company." The Arkansas Legislature has determined, at this time, that the designation of a single ETC in rural telephone company service areas is the most reliable and effective way to preserve and advance universal service under the particular local economic conditions prevailing in the rural portions of Arkansas.

Conclusion. As with the ACSI petition, the relevant and controlling question with respect the ALTS request for preemption of the rural provisions of the Arkansas Act is: "where is the conflict?" The 1996 Act expressly gave state commissions jurisdiction over the termination of the Section 251(f)(1) rural exemption, and the Arkansas Act has merely fleshed out the showing required by the "universal service" standard on which the Commission remained silent. Likewise, the 1996 Act expressly gave

state commissions the discretion to designate only one ETC in rural telephone company service areas, and the Arkansas Act merely required that this discretion be exercised by the Arkansas PSC in all rural telephone company service areas at this time. Hence, the subject rural provisions of the 1996 Act and the Arkansas Act not only can be read consistently with each other, but also are most reasonably and accurately read in such manner. In the absence of any conflict -- much less a substantial conflict -- the Commission has no need and no authority to preempt the rural provisions of the Arkansas Act or the Arkansas PSC's implementation and enforcement thereof.

**The Arkansas Act Does Not Preclude
The Availability Of Additional Network Elements**

The comments of Sprint Communications Company, L.P. (Sprint) reiterate ACSI's erroneous claim that the Arkansas Act precludes CLECs from negotiating for and obtaining additional network elements beyond the minimum set established by the Commission (Sprint Comments, p. 4). Sprint bases its claim upon a misinterpretation of Section 9(i) of the Arkansas Act.

The first sentence of Section 9(i) states that "the [Arkansas PSC] shall approve any negotiated interconnection agreement . . . unless it is shown by clear and convincing evidence that the agreement . . . does not meet the minimum requirements of Section 251 of the Federal Act." It is hard to imagine how the Arkansas Legislature could have stated more clearly that CLECs and local exchange carriers (LECs) may voluntarily negotiate their own interconnection arrangements, including ones calling for additional

network elements. The Arkansas Act expressly requires the Arkansas PSC to approve most negotiated interconnection agreements, and does not "preclude" or "deny" voluntary arrangements as Sprint asserts.

While parties may agree voluntarily to the interconnection arrangements they desire, the second sentence of Section 9(i) of the Arkansas Act prohibits the Arkansas PSC from "impos[ing] any interconnection requirements that go beyond those requirements imposed by the Federal Act or any interconnection regulations or standards promulgated under the Federal Act." This provision is wholly equivalent to and consistent with federal law. If the Commission wants Arkansas to require LECs to provide additional network elements beyond the minimum set presently designated by the Commission's rules, it does not need to follow the harsh course of preemption, but rather should merely amend its rules to include additional elements within its minimum set.

**The Arkansas Universal Service Fund Does Not
Burden The Federal Universal Service Support Mechanism**

Section 254(f) of the 1996 Act expressly permits a state to adopt regulations "not inconsistent" with the Commission's rules to preserve and advance universal service. A state may determine the equitable and nondiscriminatory manner in which providers of intrastate telecommunication services contribute to the state universal service support mechanism, and may adopt additional definitions and standards to the extent that they do not rely on or burden federal universal service support mechanisms.

Without any reference to Section 254(f), the comments of AT&T Corp. (AT&T) ask the Commission to preempt implementation of the

new Arkansas Universal Service Fund (Arkansas USF) on the grounds that it is "inconsistent" with Sections 254(k) and 254(e) of the 1996 Act. AT&T demonstrates neither that the Arkansas USF fails the "not inconsistent" criterion, nor that it imposes a burden upon the federal mechanism.

Sections 4(e)(4)(A) and (B) of the Arkansas Act permit the Arkansas PSC to respond to reductions in explicit or implicit federal universal service support by increasing local service rates, increasing Arkansas USF support, or a combination thereof. To the extent that the Arkansas PSC determines that local rate increases impair the availability of quality services at just, reasonable and affordable rates, the Arkansas USF will furnish support to ensure that critical federal and state universal service objectives are met.

AT&T fails to show how such additional Arkansas USF support might violate the Section 254(k) requirement that supported services "bear no more than a reasonable share of the joint and common costs of facilities used to provide [them]." As this Commission is well aware, internal staff memos may be drafted and leaked for a variety of purposes, some of which are wholly unrelated to the ultimate analyses and determinations of the agency. Neither AT&T nor the Arkansas PSC staff memo on which it relies show that the Arkansas USF will furnish support to ineligible services, will subsidize services subject to competition, or will burden the federal USF mechanism.

Likewise, AT&T fails to explain how the Section 254(e)

requirements regarding the use of federal universal service support are relevant to, or affected by, the distribution of Arkansas USF support. The Arkansas USF mechanism is "not inconsistent" with Section 254(e), and does not burden the federal mechanism.

**Section 11(c) Of The Arkansas Act Complies With
The Equal Protection Requirement Of The Fourteenth Amendment**

Section 11 of the Arkansas Act deals with regulatory reform for pre-existing Arkansas PSC regulations, and provides that "[a]ll future rule changes promulgated by the [Arkansas PSC] shall apply equally to all providers of basic local exchange service."

Sprint takes this regulatory reform provision out of context, and characterizes it as an attempt to impose incumbent LEC obligations upon all local exchange service providers (Sprint Comments, p. 7). This "interpretation" is not mandated by the Arkansas Act, which can be read more reasonably to require that future eliminations and relaxations of pre-existing Arkansas PSC rules be made applicable to all competing LECs. This requirement is wholly consistent with this Commission's policies regarding competitive neutrality and regulatory parity.

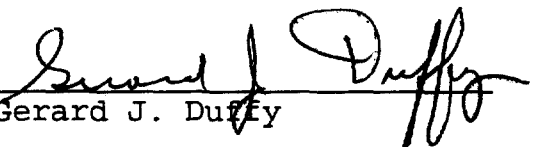
Moreover, whether Section 11(e) is ultimately applied only to pre-existing (pre-Arkansas Act) Arkansas PSC rules or to all present and future (including post-Arkansas Act) Arkansas PSC rules, it is wholly consistent with the Fourteenth Amendment requirement that a state not "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has stated that the Fourteenth Amendment operates to protect entities against arbitrary state legislation affecting life,

liberty, and property; so that all persons similarly situated are treated alike. See Hibben v. Smith, 191 U.S. 310, 325 (1903); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). In enacting economic regulations, legislatures have considerable discretion to recognize or not recognize various differences between and among persons and situations. See Barrett v. Indiana, 229 U.S. 26 (1913). Here, the Arkansas Legislature has determined not to make regulatory distinctions between competing LECs with respect to its regulatory reform program. This approach is not arbitrary or unreasonable, and is consistent with the State's equal protection obligations under the Fourteenth Amendment.

Conclusion

Neither ACSI nor the commenters supporting its petition have shown the requisite conflict between the Arkansas Act and the 1996 Act. The fact that Arkansas has elected to comply with the requirements of the 1996 Act and not go beyond them constitutes "consistency" rather than "conflict." The requested preemption should therefore be denied on judicial, statutory and Constitutional grounds.

Respectfully submitted,
NORTHERN ARKANSAS TELEPHONE
COMPANY

By 
Gerard J. Duffy

Its Attorney

Blooston, Mordkofsky,
Jackson & Dickens
2120 L Street, N.W. (Suite 300)
Washington, DC 20037
(202) 659-0830

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CERTIFICATE OF SERVICE

I, Cheryl R. Pannell, hereby certify that I am an employee of Blooston, Mordkofsky, Jackson & Dickens, and that on this 20th day of May, 1997, I caused to be delivered by hand or by U. S. Mail, a copy of the foregoing "COMMENTS OF THE NORTHERN ARKANSAS TELEPHONE COMPANY" to the following:

**Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N. W.
Room 814
Washington, D. C. 20554**

**Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N. W., Room 802
Washington, D. C. 20554**

**Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N. W., Room 844
Washington, D. C. 20554**

**Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N. W., Room 832
Washington, D. C. 20554**

**Janice Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N. W., Room 544
Washington, D. C. 20554**

**Brad E. Mutschelknaus
Danny E. Adams
Marieann Z. Machida
Kelley Drye & Warren LLP
1200 19th Street, N. W.
Suite 500
Washington, D. C. 20036**

**Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N. W., Suite 701
Washington, D. C. 20006**

Robert A. Mazer
Albert Shuldiner
Allison Yamamoto
Vinson & Elkins L.L.P.
1455 Pennsylvania Avenue, N. W.
Washington, D. C. 20004-1008

Leon M. Kestenbaum
Kent Y. Nakamura
Norina T. Moy
1850 M Street, N. W, Suite 1110
Washington, D. C. 20036

Mark C. Rosenblum
Roy E. Hoffinger
Stephen C. Garavito
AT&T Corporation
295 N. Maple Avenue
Room 3249J1
Basking Ridge, NJ 07920

Amy G. Zirkle
MCI
1801 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Emily M. Williams
Association for Local
Telecommunications Services
1200 19th Street, N. W.
Washington, D. C. 20036

Winston Bryant, Attorney General
David R. Raupp
Vada Berger
Kelly S. Terry
Office of the Attorney General
200 Catlett-Prien Tower Building
323 Center Street
Little Rock, AR 72201

Michael K. Kellogg
Austin C. Schlick
Geoffrey M. Klineberg
Kellog, Huber, Hansen
,Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D. C. 20005

George Hopkins
Attorney at Law
P.O. Box 913
Malvern, Arkansas 72104


Cheryl R. Pannell